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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1208

EDMUNDO RODRIGUEZ-ROMERO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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IN THE

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No. _____

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported. The opinion of the

District Court for the Northern District of California is unreported. Both opinions are printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals was filed on November 25, 1970, but ordered stayed on December 8, 1970 until January 8, 1971 pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, pending the filing of this petition. There has been no order respecting a rehearing nor was there any order respecting an extension of time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's deportation to Mexico, ordered as the result of his conviction for the unlawful sale of marihuana, would constitute a cruel and unusual

punishment contrary to the Eighth Amendment to the United States Constitution, inasmuch as petitioner has lived in the United States continuously since he was three years old.

2. Whether, for the same reasons, petitioner's deportation would be a discrimination between citizen and alien prohibited by the due process clause of the Fifth Amendment to the Constitution, inasmuch as a citizen cannot be deported from the United States for commission of the same crime.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Eighth Amendment to the Constitution of the United States:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 241(a)(11) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(11):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who--

* * *

"(11) is, or hereafter at any time after entry has been a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale,

exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium, or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

STATEMENT OF THE CASE

Petitioner was born in Mexico on March 20, 1945 and came to the United States as an immigrant with his parents on June 17, 1948, when he was three years old. He has lived here continuously ever since.

On December 3, 1965, upon his plea of guilty, petitioner was convicted of unlawful transportation and sale of marihuana, in violation of section 11531 of the Health and Safety Code of California.

As the result of this conviction, he was ordered deported pursuant to the provisions of section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C.

1182(a)(11), which calls for the deportation of any alien convicted at any time of any offense relating to the illicit possession or traffic in narcotic drugs or marihuana.

On January 9, 1969, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, pursuant to alleging that his impending deportation was unlawful. The District Court denied the petition on January 30, 1969, and its judgment was affirmed by the Court of Appeals on November 25, 1970.

Although petitioner alleged in the Courts below that he became a citizen of the United States at birth, he does not present that claim in this petition, but raises only the constitutional questions outlined above.

REASONS FOR GRANTING THE WRIT

The banishment of a long-term resident from the United States can be the most tragic event of his lifetime. Therefore, this Court should explore even the slightest possibility of its own error in concluding years ago that the Constitution imposes no restraints upon the power of Congress to deport aliens. It is the purpose of this petition to show the possibility of such an error.

The rule comes initially from two old cases concerned with the discredited Chinese Exclusions Laws. They are Chae Chen Ping v. United States, 130 U.S. 581, and Fong Yue Ting v. United States, 149 U.S. 698, two cases frequently cited for the proposition that the power of Congress to exclude aliens is an attribute of national sovereignty and is not derived from the Constitution; that the power to exclude

aliens implies the power to expel them; and that if the power to exclude is unlimited, so also must be the power to expel.

The opinions in both cases, however, are very long. They are confusing and obscure and marked by a number of sharp dissents. In all fairness, it is difficult to understand exactly what the cases stand for, aside perhaps from the narrow issues involved. It is particularly difficult to understand, therefore, why the cases must be taken to hold that the power of Congress to deport long term resident aliens is undisputed and unlimited. For the specific issues of the two cases did not involve the expulsion of long term residents at all.

In Chae Chan Ping, supra, a Chinese laborer had sought admission to the United States on the basis of a previously issued certificate of residence. While temporarily absent, a law had been enacted invalidating

such certificates as proof of residence. The laborer attacked the statute as a violation of the United States' treaty with China authorizing his entry.

In upholding his exclusion, the Supreme Court decided merely that in the exercise of its sovereign right as an independent nation, the United States could by means of later legislation abrogate the right of an alien to enter pursuant to treaty. Though the Court talked about the power of Congress to expel aliens as well, it is apparent that the issue truly was concerned with the power of Congress in relation to treaty obligations and to admissibility of an alien then outside of the United States, not the deportation of a long term resident.

In Fong Yue Ting, supra, the issue also concerned proof of lawful residence on the part of Chinese laborers. The laborer had the burden of proving his lawful residence

and could sustain that burden only upon the testimony of at least "one credible white witness." Otherwise, he would be deported.

Ultimately, the Court upheld the statute involved as a valid rule of evidence justified by the difficulty of proving the unlawful admission of Chinese laborers. Once again, while the Court talked about the expulsion powers of Congress, it is difficult to understand why the Court's opinion must be accepted as holding that the power of Congress is unlimited. For the issue again was more closely related to the admission of aliens and at best to the expulsion of those aliens who had gained entry illegally. It had nothing to do with the banishment of long term residents whose initial entry was perfectly lawful and whose deportation was sought as the result of conduct long after entry.

Bugajewitz v. Adams, 228 U.S. 585, is

another case often cited for the rule of unlimited congressional power to deport aliens. And indeed this Court did say that the power of Congress to deport aliens whose presence it deems hurtful was by then "thoroughly established."

But again, the issue did not directly involve the conduct of an alien lawfully admitted, for conduct long after such admission. Rather, the issue, narrowly drawn, involved the validity of a presumption that by practicing prostitution some time after entry, the lady in question must have been a prostitute at the time of entry and therefore that her entry must have been illegal.

In other words, post entry conduct was viewed as evidence of illegal entry in the first place. And it is not necessary to read the opinion as sanctioning the right of Congress to deport an alien for

any kind of conduct long after entry which has had no connection with the validity of his original entry.

This interpretation is supported by Keller v. United States, 213 U.S. 138, decided just four years earlier. There, the Court specifically noted that the issue of the limits of Congressional power was still an open question, 213 U.S. 144. This is a rather startling statement if indeed the Chinese Exclusion cases had already resolved the issue in favor of no limits whatever.

Moreover, in his dissent, Mr. Justice Holmes, who later wrote the Court's opinion in Bugajewitz, saw the possibility of some limits on Congressional authority. He said that Congress had the right to determine by an alien's conduct after entry, for a period"long enough to make sure of the facts", that the alien did not enter

illegally. Just how long might be long enough, he did not say. But implicit in his comment is that some periods might be too long. Hence, that Congress might indeed go too far and be restricted by the due process requirement that an alien's conduct bear a rational connection with the authority of Congress to regulate immigration.

Finally, there is Harisiades v. Shaughnessy, 342 U.S. 580, which now is taken as the leading case for the rule of unlimited congressional authority. Clearly, the Court did say that the due process clause placed no substantive limits upon the deportation powers of Congress. And, clearly, the aliens involved were long-term residents.

But at the very outset, the Court accepted the rule as already settled by the cases previously referred to here, cases which in fact did not really deal with the expulsion of long-term residents

for conduct long after entry at all. 1/

CONCLUSION

We respectfully suggest that the cases mentioned above do not justify the rule sanctioning his deportation. If anything, as Mr. Justice Frankfurter once said of another line of cases, "they merely prove how a hint becomes a suggestion, is loosely turned into dictum and is finally elevated to a decision."

Frankfurter, J., dissenting in U.S v. Rabinowitz, 339 U.S. 56, 75.

We respectfully suggest that there is an important difference between the expulsion of a newly arrived settler and one who has lived virtually all of his life in

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1/ Extensive comments upon the issue and cases involved in this discussion, are made in the following articles:

Hesse, "The Constitutional Status of the Lawfully Admitted Permanent Resident Alien," 68 Yale L.J. 1578 and 69 Yale L.J. 261 (1959).

Boudin, "The Settler Within Our Gates," 26 N.Y.U.L. Rev. 266, 451, 634 (1951).

the United States. To the former, deportation may be a disappointment and an inconvenience and his conduct within a reasonable time after entry can be reasonably related to the objective of Congress in keeping out those it might consider undesirable.

But the long-term resident whose conduct long after entry can have no rational bearing to the same objective is another matter. His banishment may be of tragic proportions. He may be separated from his home and family and livelihood and sent to a country of which he knows nothing.

It was of him that James Madison spoke when he said that if banishment under such circumstances is not among the severest of punishments "it will be difficult to imagine a doom to which the name can be applied." 4 Elliott Deb. 555.

This Court has itself expressed its reluctance in going along with the rule of unlimited congressional authority. Galvan v. Press, 347 U.S. 531. It did so, however, in the name of precedent.

Yet if this Court is to uphold the rule of unlimited congressional authority, and avert the impact of the Eighth Amendment and Due Process Clause, it can do so only by continued resort to the fiction that deportation is not a punishment.

Perhaps it is time for the Court to abandon a rule so out of touch with reality.

Dated at San Francisco, California, January 6, 1971.

Donald L. Ungar

Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDMUNDO RODRIGUEZ-ROMERO, Appellant	)	
vs.	)	No. 23880
IMMIGRATION & NATURALIZATION SERVICE. Appellee.	)	

[November 25, 1970]

Appeal from the United States District Court for the Northern District of California

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Before: MERRILL, KOELSCH and CARTER, Circuit Judges

PER CURIAM:

Following his state conviction on a charge of trafficking in marihuana, Edmundo Rodriguez-Romero (appellant) was ordered deported pursuant to 8 USC § 1251 (a)(11), a statute which requires the

the deportation of such an alien. His appeal to the Board of Immigration Appeals was dismissed, and he then filed a petition in the United States District Court for the writ of habeas corpus. He asserted two grounds for relief: that he was and is a United States citizen and could not be deported and that, even if he were an alien, his deportation would violate the due process and cruel and unusual punishment clauses of the Constitution. The matter is here on Rodriguez-Romero's appeal from the district court's order denying the writ.

1. Appellant was born in the Republic of Mexico, but claims citizenship through his father. Section 201(g) of the Nationality Act of 1940 (54 Stat. 1138-1139), the law in effect at the time of appellant's birth in 1945 provided in pertinent part as follows:

> Sec. 201. The following shall be nationals and citizens of the United States at birth:
>
> (g) A person born outside the United States and its outlying possessions of parents, one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, ..."

(a) However, appelant's father, although a native born citizen of the United States, was not actually present in the United States or one of its outlying possessions for the requisite ten year period; to the contrary, in the year 1918, when three years of age, he had been taken by his own parents to Mexico, where he remained continuously until 1945 when he returned to this Country.

(b) Neither can it be concluded,

from any fair appraisal of the relevant evidence, that appellant's father had had a "constructive residence"in the United States for such a period. See Toy Teung Kwong v. Acheson, 97 F. Supp. 745,(D.C. N.D. Cal 1951). Section 104 of the Act provided that "For the purposes of section 201 - of this Act, the place of general abode shall be deemed place of residence." The "Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of abode' it required only that it be the place of general abode." Savorgnan v. United States, 338 U.S. 491 (1950). It excluded as a factor, in determining the issue of residence, any subjective intent of the person

under consideration. 1/

The evidence in the record is to the effect that when the appellant's father's parents went to Mexico in 1918, they established their home there; that appellant's father remained a member of that household until he grew to maturity; that he was employed in Mexico; that he was married in Mexico; that he too established and maintained his home in Mexico and that he actually lived there for 27 years before returning to the United States. No evidence was introduced showing or tending to show as "an objective fact" that, save for the first three years of his life, his "place of general abode"

1/ Section 104 applies equally to Section 201 and to Section 403, the section under consideration in the Savorgnan case.

was elsewhere than Mexico.

(c) It is unnecessary to consider appellant's novel contention that he is a citizen by virtue of Rev. Stat. 1993, the predecessor of Sec. 201(g). The saving clause (appearing as Sec. 347(a) of the Act) relied upon by appellant to continue in effect Section 1993 (despite its repeal by Sec. 504 of the Act) did not extend to provisions in the repealed statute relating to nationality at birth, but was expressly limited to the preservation of provisions relating to nationality through naturalization and to several miscellaneous matters irrelevant to appellant's claim.

2. Relief on the second ground, urged by appellant, is rendered unavailable, as appellant himself recognizes, by the Supreme Court's decision in Harisiades v.

Shaughnessy, 342 U.S. 580 (1952).

JUDGMENT AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Petition of EDMUNDO RODRIGUEZ-ROMERO, For a Writ of Habeas Corpus.	No. 50575

[January 30, 1969]

ORDER

On December 3, 1965, petitioner was convicted on his own plea of guilty of transportation and sale of marijuana in violation of §11531 of the California Health and Safety Code. Subsequently the Immigration and Naturalization Service ordered that petitioner be deported pursuant to 8 U.S.C. § 1251(a)(11), which provides in part that any alien convicted of a narcotic drugs or marijuana offense "shall upon the order of the Attorney

Petitioner seeks to avoid deportation by petitioning this Court for a writ of habeas corpus. The proposed deportation is alleged to be unlawful on two grounds: (1) that petitioner is a citizen of the United States, and thus is not subject to deportation, and (2) that deportation constitutes cruel and unusual punishment and a denial of due process. Having heard argument and considered the points and authorities presented by both sides, this Court concludes that petitioner is not a citizen of the United States and that the proposed deportation would not be unconstitutional.

Therefore IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

Dated: January 30, 1969.

s/ Stanley Weigel
Judge

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1208

EDMUNDO RODRIGUEZ-ROMERO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A7) is not yet reported. The memorandum order of the District Court for the Northern District of California (Pet. App. A8-A9)[1] is unreported.

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[1] Through typographical error, a few words are missing from the district court's order as reproduced in petitioner's appendix. Therefore, we have appended hereto a complete copy of the order.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1970. The petition for a writ of certiorari was filed on January 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether deportation of a long-time alien resident of the United States for conduct arising after his entry is inconsistent with the Eighth Amendment proscription against cruel and unusual punishment or the Fifth Amendment due process guarantee.

STATEMENT

The facts are not in dispute. Petitioner, a 25-year-old native of Mexico, entered the United States on June 17, 1948, at the age of three and has resided here continuously since that date. On December 3, 1965, he was convicted on a guilty plea in California state court of trafficking in marijuana in violation of Section 11531 of the California Health & Safety Code. Based on that conviction, the Immigration Service brought deportation proceedings against petitioner under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11)[1] and ordered him deported to Mexico. The

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[1] Section 241(a)(11) provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

[Footnote continued on p. 3.]

Board of Immigration Appeals affirmed.

Petitioner challenged the ensuing order to surrender for deportation by a petition for a writ of habeas corpus in the District Court for the Northern District of California. There, he raised the same constitutional objections on which he now relies, and also contended that he is a citizen of the United States and thus could not be deported. The district court upheld the deportation order, finding that petitioner is an alien and rejecting the constitutional attack (Pet. App. A8-A9). The Court of Appeals affirmed per curiam (Pet. App. A1-A7).

ARGUMENT

Petitioner's sole contention in this Court is that deportation of a long-time resident alien amounts to cruel and unusual punishment and impermissible discrimination between alien and citizen. As he did

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[Continued]

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate; * * *

in the courts below, petitioner here concedes that this Court has consistently held contrary to his contentions.

1. This Court has without exception held that deportation is not cruel and unusual punishment within the meaning of the Eighth Amendment since deportation proceedings are civil and not criminal. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591. See also, *Kwai Chin Yuen* v. *Immigration and Naturalization Service*, 406 F.2d 489 (C.A. 9), certiorari denied, 395 U.S. 906; *Cortez* v. *Immigration and Naturalization Service*, 395 F.2d 965 (C.A. 5); *Chabolla-Delgado* v. *Immigration and Naturalization Service*, 354 F.2d 360 (C.A. 9). This view was recently confirmed in *Woodby* v. *Immigration Naturalization Service*, 385 U.S. 276; there, in construing the government's burden of proof in deportation proceedings, the Court explicitly noted that such proceedings are not criminal prosecutions. *Id.* at 285. There is consequently no reason for further consideration of this question.

2. Similarly unavailing is petitioner's assertion that deportation of an alien long a lawful permanent resident of this country is impermissible because a citizen is immune from deportation. This Court has frequently observed that distinctions between citizens and aliens are customary and valid under both international and domestic law; and it is well settled that under these principles Congress has broad powers and may deport aliens (such as petitioner) lawfully admitted for permanent residence. *Galvan*

v. *Press*, 347 U.S. 522, 531-532; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Carlson* v. *Landon*, 342 U.S. 524; *MacKay* v. *McAlexander*, 268 F.2d 35 (C.A. 9), certiorari denied, 362 U.S. 961.

Petitioner could have sought naturalization, as can any alien who is a permanent resident, and thus have placed himself without the reach of the deportation statutes. But petitioner chose not to do so. In this circumstance, the language of *Carlson* v. *Landon*, *supra*, 342 U.S. at 534, is apposite:

> The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
GEORGE W. MASTERTON,
Attorneys.

FEBRUARY 1971

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 50575

Petition of

EDMUNDO RODRIGUEZ-ROMERO,
For a Writ of Habeas Corpus

ORDER

On December 3, 1965, petitioner was convicted on his own plea of guilty of transportation and sale of marijuana in violation of § 11531 of the California Health and Safety Code. Subsequently the Immigration and Naturalization Service ordered that petitioner be deported pursuant to 8 U.S.C. § 1251(a)(11), which provides in part that any alien convicted of a narcotic drugs or marijuana offense "shall, upon the order of the Attorney General, be deported * * *."

Petitioner seeks to avoid deportation by petitioning this Court for a writ of habeas corpus. The proposed deportation is alleged to be unlawful on two grounds: (1) that petitioner is a citizen of the United States, and thus is not subject to deportation, and (2) that deportation constitutes cruel and unusual punishment and a denial of due process. Having heard argument and considered the points and authorities presented by both sides, this Court concludes that petitioner is not a citizen of the United States and that the proposed deportation would not be unconstitutional.

Therefore IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is denied.

Dated: January 30, 1969.

STANLEY A. WEIGEL
Judge

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